FILED
99 568 SEP 30 1999
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

JENNIFER EFRON, a minor, by and through DAVID EFRON and MADELEINE EFRON, her next friends,

Petitioners,

–against–

THE UNITED STATES OF AMERICA; and THE DEPARTMENT OF IMMIGRATION AND NATURALIZATION

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

NATHAN Z. DERSHOWITZ
DERSHOWITZ & EIGER, P.C.
350 Fifth Avenue, Suite 7912
New York, NY 10118
(212) 967-0667

COUNSEL OF RECORD

ALAN M. DERSHOWITZ
AMY ADELSON
Of Counsel

Attorneys for Petitioners

QUESTIONS PRESENTED FOR REVIEW

1. Should certiorari be granted to determine whether a complaint states a claim upon which relief can be granted where plaintiff has alleged that her due process and equal protection rights were violated because she was precluded from applying for "naturalization," a class of citizenship protected by the Fourteenth Amendment of the Constitution, solely because she was born in Puerto Rico which confers a statutory, revocable citizenship?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION OF THIS COURT 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 1

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 7

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE IMPORTANT QUESTION OF WHETHER FIFTH AMENDMENT PRINCIPLES OF DUE PROCESS AND EQUAL PROTECTION ARE OFFENDED BY THE UNITED STATES' STATUTORY POLICY OF PRECLUDING PUERTO RICAN BORN

RESIDENTS, WHO HAVE STATUTORY CITIZENSHIP, FROM SEEKING THE IRREVOCABLE, CONSTITUTIONAL CITIZENSHIP AVAILABLE TO RESIDENT ALIENS 7

CONCLUSION 13

APPENDIX

Judgment of the Court of Appeals for the Eleventh Circuit dated July 2, 1999 ..... App. 1

Order granting Defendants' motion to dismiss the First Amended Complaint dated October 30, 1998 ..... App. 3

TABLE OF AUTHORITIES

CASES

Afroyim v. Rusk,
387 U.S. 253 (1967) 10

Laurie v. United States,
231 U.S. 9 (1913) 8

Reno v. Flores,
507 U.S. 292 (1993) 12

United States v. Wong Kim Ark,
169 U.S. 649 (1898) 8

CONSTITUTION, STATUTES AND RULES

U. S. Constitution, Art. 1, § 8 7

U. S. Constitution, Art. IV, § 3 ..... 2, 9

U. S. Constitution, Amend. V ..... passim

U. S. Constitution, Amend. XIV ..... passim

8 U.S.C. § 1101(a)(3) 8

8 U.S.C. § 1401 2

8 U.S.C. § 1402 ..... passim

8 U.S.C. § 1427 ..... 3, 5, 8

28 U.S.C. § 1254 1

28 U.S.C. §1331 6

Federal Rules of Civil Procedure,
Rule 12 6

OPINIONS BELOW

The Opinion and Judgment by the Court of Appeals for the Eleventh Circuit is unpublished and is set forth in the Appendix at App. 1. The Order of the District Court for the Southern District of Florida is unpublished and is set forth in the Appendix at App. 3

JURISDICTION OF THIS COURT

The Judgment of the Court of Appeals for the Eleventh Circuit was entered on July 2, 1999. This Court has jurisdiction to review that judgment pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be .... deprived of life, liberty, or property, without due process of law

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> All person born or naturalized in the United

> States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

The Territorial Clause of the United States Constitution, Article IV, § 3, provides that:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the territory or other Property belonging to the United States;

The Immigration and Nationality Act, 8 U.S.C. § 1401, provides, in pertinent part:

> The following shall be nationals and citizens of the United States at birth:
>
> (a) a person born in the United States, and subject to the jurisdiction thereof;

The Immigration and Nationality Act, 8 U.S.C. § 1402, provides, in pertinent part:

> All persons born in Puerto Rico on or after January 13, 1941, and subject to the jurisdiction of the United States, are citizens of the United States at birth.

The Immigration and Nationality Act, 8 U.S.C. § 1427, provides, in pertinent part:

> Requirements of naturalization
>
> (a) Residence - No person, except as otherwise provided in this subchapter, shall be naturalized unless such applicant, (1) immediately preceding the date of filing his application for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his application has been physically present therein for periods totaling at least

> half of that time, and who has resided within the State or within the district of the Service in the United States in which the applicant filed the application for at least three months, (2) has resided continuously within the United States from the date of the application up to the time of admission to citizenship, and (3) during all the period referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well-disposed to the good order and happiness of the United States.

STATEMENT OF THE CASE

Jennifer Efron, the petitioner in this case, was born in the Commonwealth of Puerto Rico in 1984. She has resided in Miami-Dade County, Florida for over five years. Ms. Efron is a United States citizen by virtue of an Act of Congress, 8 U.S.C. § 1402, which provides that persons born in the

Commonwealth of Puerto Rico after January 13, 1941 are citizens of the United States at birth.

Ms. Efron met the residential and related requirements for naturalized citizenship set forth in the Immigration and Nationality Act, 8 U.S.C. § 1427. Desirous of obtaining the constitutional citizenship accorded to persons "born or naturalized in the United States," as provided for in the Fourteenth Amendment, rather than the statutory citizenship accorded persons born in Puerto Rico, Ms. Efron attempted to apply for naturalization with the Department of Immigration and Naturalization (the "INS"). The INS refused to process her application on the ground that she already had "statutory" United States citizenship.

Ms. Efron, through her parents David and Madeleine Efron, commenced this action against the United States of America and the INS in the District Court for the Southern District of Florida claiming that the INS violated her Fifth Amendment rights by refusing to process her application for naturalized citizenship, and seeking a declaratory judgment that 8 U.S.C. § 1427 was unconstitutional on its face and as

applied.[1] Jurisdiction was premised on 28 U.S.C. § 1331.

The United States moved to dismiss Ms. Efron's amended complaint pursuant to Rule 12 of the Federal Rules of Civil Procedure on the ground that the complaint failed to set forth a claim for relief. On October 30, 1998, the District Court entered an order granting the United States's motion to dismiss. The District Court determined that, as a matter of law, Ms. Efron had failed to make a showing that she had a fundamental right to become a naturalized citizen, and, that, applying a highly deferential rational basis standard of review, the challenged statutory scheme, which precluded persons born in Puerto Rico from becoming United States citizens by the naturalization process – and therefore obtaining "constitutional citizenship – had a rational purpose. (App. 5) The District Court did not address Ms. Efron's claim that the statute discriminated against her on the basis of national origin – her Puerto Rican birth.

---

[1] Ms. Efron's original complaint was dismissed by Order entered April, 7, 1998 on the ground that there was no case or controversy, and that the District Court, therefore, lacked subject matter jurisdiction. 1 F. Supp. 2d 1468 (S.D. Fla. 1998). Ms. Efron filed an amended complaint, and it is the amended complaint that is at issue in this Petition.

On July 2, 1999, without opinion, the Eleventh Circuit affirmed the judgment of the District Court. (App. 1)

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE IMPORTANT QUESTION OF WHETHER FIFTH AMENDMENT PRINCIPLES OF DUE PROCESS AND EQUAL PROTECTION ARE OFFENDED BY THE UNITED STATES' STATUTORY POLICY OF PRECLUDING PUERTO RICAN BORN RESIDENTS, WHO HAVE STATUTORY CITIZENSHIP, FROM SEEKING THE IRREVOCABLE, CONSTITUTIONAL CITIZENSHIP AVAILABLE TO RESIDENT ALIENS

Section 1 of the Fourteenth Amendment to the United States Constitution provides that "all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." The Constitution also provides that Congress shall have the power "to establish an uniform Rule of Naturalization." U. S. Const., Art. 1, § 8.

This Court has recognized that there are "two sources of citizenship, and two only: birth and

naturalization." United States v. Wong Kim Ark, 169 U.S. 649, 702 (1898). "Under our Constitution, a naturalized citizen stands on an equal footing with the native citizen in all respects, save that of eligibility to the presidency." Laurie v. United States, 231 U.S. 9, 22 (1913). The basic issue posed by this case – an issue of profound importance to the over three million Puerto Ricans who reside in this country (March 1997, Current Population Survey, Bureau of the Census) – is whether "naturalization" can be made unavailable to a class of people simply because they were born in Puerto Rico.

Jennifer Efron was born in Puerto Rico in 1984, but she has resided for many years in Florida. Pursuant to 8 U.S.C. § 1402, Efron is, by statute, a citizen of the United States because she was born in Puerto Rico after 1941. Efron, though a statutory United States citizen, applied for naturalization – a form of citizenship explicitly protected by the Fourteenth Amendment. Pursuant to 8 U.S.C. § 1427, an alien can apply for naturalization if he or she has a good moral character and is a lawful permanent resident of the United States for the five years proceeding the application. Efron satisfied these criteria, but the INS refused to process her application claiming she was not an "alien," because, by statute, an alien is "not a citizen or National of the United States." 8 U.S.C. § 1101(a)(3).

Efron brought this action in the United States District Court for the Southern District of Florida claiming that her due process and equal protection rights were violated by the refusal to allow her to apply for naturalized citizenship. In particular, Efron claimed that classifying Puerto Ricans born after January 13, 1941 as ineligible to apply for constitutional citizenship creates a "suspect classification" based on "national origin" or "race."

Throughout, Efron has contended that the statutory citizenship granted pursuant to 8 U.S.C. § 1402 is significantly different from constitutional citizenship under the Fourteenth Amendment because the statutory citizenship accorded to persons born in Puerto Rico is revocable by Congress,[2] while constitutional citizenship can only be lost through

---

[2] Under the Territorial Clause of the United States Constitution, Art. IV, § 3, Congress has the power to make laws respecting the territories of the United States. Presumably, pursuant to this authority, Congress may revoke the statutory citizenship granted to Puerto Ricans born after January 13, 1941. Indeed, a bill has been introduced in Congress by United States Representative Don Young that would revoke statutory citizenship to those born in Puerto Rico if Puerto Rico votes for independence.

voluntary acts of the citizen.[3] The United States, although it has vigorously fought to stave off any review of Efron's claims, has never denied the validity of Efron's argument.

Instead, the United States has sought to deny Efron a judicial forum to address her claim. The United States originally argued that there was no justiciable case or controversy because, in the absence of the actual revocation of her statutory citizenship, Efron suffered no recognizable harm. The District Court dismissed Efron's original complaint on this basis. After Efron amended her complaint, the United States took a different tack, arguing that there is no fundamental right to naturalization, and, therefore, that a statutory citizen of the United States who is a lawful resident of a state for five years has no fundamental interest at stake when the INS precludes her from seeking naturalization. The District Court agreed and dismissed the amended complaint, and the Eleventh Circuit affirmed.

Although the lower courts have refused her access, Efron's complaint has alleged a very concrete

---

[3] Under the Fourteenth Amendment, citizens born in the United States cannot have their citizenship revoked without their consent. Aliens who are naturalized and become citizens also cannot have their citizenship involuntarily revoked. Afroyim v. Rusk, 387 U.S. 253 (1967).

and very significant Constitutional wrong: as a result of the current statutory scheme, a non-citizen alien – a person from Germany or China or Mexico, for example – who is a lawful resident of a state for five years may become a constitutionally protected citizen, but, Efron, because of her Puerto Rican birth, may not. She may only attain the less desirable, and potentially revocable, statutory citizenship accorded to those born in Puerto Rico after 1941.

This Petition asks this Court to determine whether Efron has presented a cognizable claim. First, it asks this Court to decide whether persons born in Puerto Rico may properly claim that treating them disparately constitutes discrimination on the basis of a suspect classification. Second, it asks the Court to resolve whether the statutory citizenship accorded by 8 U.S.C. § 1402 is so significantly different from Fourteenth Amendment citizenship that the refusal to allow a person with statutory citizenship to apply for constitutional citizenship states a claim based on the deprivation of equal protection and due process. Put another way, this case asks this Court to decide whether Congress can create a class of citizenship that is less desirable than the citizenship accorded those who are born in the United States, provide that resident aliens from countries other than Puerto Rico can seek the more desirable form of citizenship through the process of naturalization, but refuse to extend the right to seek naturalization to Puerto Rican born citizens.

The issues posed by this Petition should be addressed by this Court since they are undeniably substantial questions that deserve a more thorough analysis than they received in the courts below. Efron has alleged that she has a fundamental liberty interest in being allowed to "upgrade" her statutory citizenship into constitutional citizenship, and that the government's policy of precluding Puerto Rican citizens from even seeking to become a naturalized citizen, with all of its benefits, is both discriminatory and irrational. A statute which allows "aliens" to become naturalized citizens but prevents statutory citizens from securing such citizenship is not "narrowly tailored to serve a compelling state interest." Reno v. Flores, 507 U.S. 292, 302 (1993). Treating aliens in a preferential manner over citizens who secured their citizenship by being born in an American territory bears no rational relationship to a legitimate end. Moreover, if the statutory scheme does indeed prohibit Puerto Rican born citizens from seeking naturalization, then it is legislation that permanently relegates Puerto Rican citizens to second class status. Whether such disparate treatment on the basis of national origin violates due process and equal protection is a matter of great public importance and an issue meriting this Court's review.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Nathan Z. Dershowitz
COUNSEL OF RECORD
Dershowitz & Eiger, P.C.
350 Fifth Avenue, Suite 7912
New York, NY 10118
(212) 967-0667

Attorneys for Petitioner

Alan M. Dershowitz
Amy Adelson
Of Counsel

APPENDIX

United States Court of Appeals

for the Eleventh Circuit

No. 98-5830
Non-Argument Calendar

District Court Docket No. 96-03706-CIV

JENNIFER EFRON, a minor,
by and through David Efron
and Madeleine Efron as her
next friends,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

Before COX and MARCUS, *Circuit Judges*, and FAY, *Senior Circuit Judge*.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court

upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT plaintiff-appellant pay to the defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: July 2, 1999
For the Court: Thomas K. Kahn, Clerk

By: Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: AUG. 25, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 96-3706-CIV-MOORE

JENNIFER EFRON, a minor, by and through DAVID EFRON and MADELEINE EFRON, as her next friends,

Plaintiff,

vs. **ORDER**

THE UNITED STATES OF AMERICA,

Defendant.
_____/

THIS CAUSE came before the Court upon Defendants' Motion to Dismiss First Amended Complaint (DE #28).

UPON CONSIDERATION of the Motions, responses, and the pertinent portions of the record and being otherwise fully advised in the premises, the Court enters the following Order:

BACKGROUND

Jennifer Efron ("Efron"), a minor, brings suit by and through David Efron and Madeleine Efron, her parents and next friends, alleging the United States violated her due process rights under the Fifth Amendment and seeking declaratory relief against the United States.

Efron, a resident of Dade County, Florida for at least five years, was born in Puerto Rico in 1984. Pursuant to 8 U.S.C. §

1402, which provides that all persons born in Puerto Rico on or after January 13, 1941 who are subject to the jurisdiction of the United States are citizens of the United States at birth. Efron was accorded United States citizenship at birth. Efron has attempted to file an application for naturalization pursuant to 8 U.S.C. § 1427 but was denied by the Immigration and Naturalization Service ("INS") because she is already a United States citizen. Efron seeks naturalized citizenship because of what she views as the possibility that Congress could revoke or diminish her "statutory" citizenship. In Count I of her first amended complaint, Efron alleges that Congress, through the INS, violated her Fifth Amendment due process rights when it refused to process her application for naturalized citizenship. In Count II, Efron seeks a declaration that 8 U.S.C. § 1427 is unconstitutional on its face or as applied to Efron.[1]

DISCUSSION

Efron argues that because she is unable to obtain constitutional, naturalized citizenship, her due process and equal protection rights granted by the Fifth Amendment have been violated. The Fifth Amendment "forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what the process is provided, unless the infringement is narrowly tailored to serve a compelling interest." Reno v. Flores, 507 U.S. 292, 302 (1993). A legislative classification or distinction that "neither burdens a fundamental right nor targets a suspect class" will be upheld "so long as it bears a rational relation to some legitimate end." Vacco v. Quill, 117 S. Ct. 2293, 2297 91997) (quoting Romer v. Evans, 517 U.S. 620 (1996)). Thus, to state a claim, Efron must show that a fundamental liberty interest has been infringed by the government in not permitting her to be

---

[1] Efron also seeks redress from 8 U.S.C. § 1101, however that section contains only definitions and provides no substantive rights.

naturalized. The Court believes Efron has failed to make such a showing.

While the Constitution provides fundamental rights to those persons who are born or naturalized as citizens of the United States, the actual right to become naturalized is not a fundamental right. The Court is unaware of any authority stating the right to be naturalized is fundamental and Efron has failed to provide any support for her argument. See also Brever v. Meissner, 1998 WL 544957 (E.D. Pa. Aug. 27, 1998) ("No federal court has held that a person born outside the United States has a fundamental right to a statutory grant of citizenship."); see also Terrace v. Thompson, 263 U.S. 197, 200 (1923) ("Congress ... may grant or withhold the privilege of naturalization upon any grounds or without any reason, as it sees fit."). The Constitution provides that Congress shall have the power "to establish an uniform Rule of naturalization," U.S. const. Art. I, § 8, cl. 4, yet nowhere does it state that persons have a right to become naturalized. The naturalization process is entirely within the purview of Congress and such power has been construed broadly and is subject only to limited judicial review. See INS v. Pangilinan, 486 U.S. 875 (1988).

Because the Court finds there is no implication of a fundamental right, the Court reviews 8 U.S.C. § 1427 under the highly-deferential rational basis standard. Under this standard, a challenged provision will be upheld as long as it is 'rationally related to a legitimate government interest." Schwarz v. Kogan, 132 F.3d 1387, 1391 (11th Cir,) cert. denied, 118 S. Ct. 2372 (1998). Thus, if there is any "conceivably valid justification" for the statute and there is a causal link between the purpose of the statute and the methods selected to further this purpose, then no due process violation exists. Id.

Section 1427 was enacted to provide a means by which individuals could become citizens of the United States through naturalization. This statute is clearly within Congress's authority as granted by the Constitution and serves the legitimate purpose

of Congress exercising its legislative power concerning naturalization. Pursuant to this authority, Congress chose to allow citizens of Puerto Rico, a United States territory to become United States Citizens without having to go through the naturalization process as provided in Section 1427. Thus, Congress could rationally conclude that persons born in Puerto Rico who were granted statutory citizenship would not need another means to become a United States citizen. Accordingly, Congress had a rational basis for enacting Section 1427 and providing that only aliens-not United States citizens-were subject to its provisions.

Accordingly, because the Court finds Efron has failed to state a claim upon which relief may be granted, Defendant's motion to dismiss will be granted.

CONCLUSION

Based on the foregoing, it is ORDERED AND ADJUDGED that Defendant's Motion is GRANTED. This case is CLOSED. All motions not otherwise ruled upon are DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 30th day of October, 1998.

K.M. Moore
K. MICHAEL MOORE
UNITE STATES DISTRICT JUDGE

cc: Karin B. Morell, Esq.
Dexter A. Lee, AUSA
Jane R. Gomez, Esq.

Supreme Court, U.S.
FILED
OCT 29 1999
OFFICE OF THE CLERK

No. 99-568

In The

Supreme Court of the United States

JENNIFER EFRON, a minor, by and through DAVID EFRON and MADELEINE EFRON, her next friends,

Petitioners,

v.

THE UNITED STATES OF AMERICA; and THE DEPARTMENT OF IMMIGRATION AND NATURALIZATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF THE COMMONWEALTH OF PUERTO RICO AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

JOSE A. FUENTES-AGOSTINI
Counsel of Record
Attorney General
Commonwealth of Puerto Rico

GUSTAVO A. GELPI
Solicitor General
Commonwealth of Puerto Rico
Department of Justice
P.O. Box 9020192
San Juan, Puerto Rico 00902-0192
(787) 724-6428, 724-2165

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

INTRODUCTION 1

INTEREST OF THE AMICUS COMMONWEALTH OF PUERTO RICO 2

REASONS FOR GRANTING THE PETITION 5

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

Afroyim v. Rusk, 387 U.S. 253 (1967) 2, 4

Board of Education of Kiryas Joel Village School District v. Grumet, 512 U.S. 687 (1994) 3

Clark v. Jeter, 486 U.S. 456 (1988) 6

City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) 6

Downes v. Bidwell, 182 U.S. 244 (1901) 4

Examining Board of Engineers, Architects and Surveyors v. Flores de Otero, 426 U.S. 572 (1976) 1, 6

Gonzales v. Williams, 192 U.S. 1 (1903) 4

Harris v. Rosario, 446 U.S. 651 (1980) 2, 6

Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869 (1985) 6

Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, 508 U.S. 656 (1993) 3

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 3

Rogers v. Bellei, 401 U.S. 815 (1971) 4

Shaw v. Reno, 509 U.S. 630 (1993) 3

Zobel v. Williams, 457 U.S. 55 (1982) 6

STATUTES

Immigration and Nationality Act § 302, 8 U.S.C. § 1402 ..... 1, 4

8 U.S.C. § 1427 2

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION

Fourteenth Amendment to the United States Constitution.....2, 4, 6, 7

OTHER AUTHORITIES

Jones Act, 39 Stat. 951, 953 (1917)..... 1

INTRODUCTION

The Commonwealth of Puerto Rico urges this Court to grant the petition before its consideration because it presents a substantial, unresolved question of vital importance to the petitioner, to other persons similarly situated, and to the Commonwealth of Puerto Rico.[1] The petition asks this Court to decide whether it is constitutionally permissible for the United States to bar its own citizens who are born in Puerto Rico from applying for constitutionally protected citizenship, while nonetheless affording the opportunity to obtain naturalized, constitutionally protected citizenship to resident aliens. The District Court dismissed petitioner's claim, finding that this discrimination satisfied a "rational basis" analysis. The Court of Appeals affirmed without opinion. Neither court, however, weighed into its analysis the relevance of the unique one hundred year relationship between Puerto Rico and the United States. *See Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 596 (1976) (noting that "Puerto Rico occupies a relationship to the United States that has no parallel in our history"). Nor did the courts below assess whether the rationality of federal policy is drawn into question by the

---

[1] Since 1917 federal statutes have recognized that persons born in Puerto Rico are United States citizens. *See* Jones Act, 39 Stat. 951, 953 (1917); Immigration and Nationality Act § 302, 8 U.S.C. § 1402. Statistics from the United States Bureau of the Census indicate that presently there are between two and a half to three million (2,500,000 – 3,000,000) Puerto Rican born United States citizens living in the States of the Union, and approximately four million (4,000,000) other such United States citizens living in the island of Puerto Rico.

stigmatizing effect of 8 U.S.C. § 1427, which, in a discriminatory fashion, singles out persons born in Puerto Rico – a United States territory – for disfavored treatment in comparison with persons from foreign nations. This Court should grant the petition at bar in order to identify the proper legal framework for assessing a classification that discriminates in this manner, and thus disadvantages and stigmatizes Puerto Rican born United States citizens on the basis of their birth in a United States territory. Such serious issues require definite resolution and "warrant the full attention of this Court before [they be] made part of our constitutional jurisprudence". *See Harris v. Rosario*, 446 U.S. 651, 654 (1980) (Marshall, J., dissenting).

INTEREST OF THE AMICUS COMMONWEALTH OF PUERTO RICO

The Commonwealth of Puerto Rico has a profound interest in the status and welfare of the several million United States citizens born therein and in the juridical status of these persons to the United States. Under the terms of 8 U.S.C. § 1427, persons of Puerto Rican birth are largely ineligible to apply for "naturalized" United States citizenship that, once granted, would be irrevocable under the Fourteenth Amendment to the United States Constitution. *See Afroyim v. Rusk*, 387 U.S. 253, 268 (1967). The inability to be considered for constitutionally protected, naturalized citizenship constitutes a present injury to persons of Puerto Rican birth. There can be no doubt that constitutionally protected United States citizenship is a very great benefit. Just as clearly, there can be no doubt that the denial of the opportunity to be considered for a

valuable benefit constitutes a significant, present injury. *See Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (recognizing that "[w]hen the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group", a member of the disadvantaged group suffers "injury in fact", regardless of whether "he would have obtained the benefit but for the barrier"); *Regents of the University of California v. Bakke*, 438 U.S. 265, 280-81 n. 14 (1978) (also finding that denial of opportunity to pursue a benefit constitutes a present injury).

In this case, the injury to petitioner and to members of her group is significantly greater because it is stigmatizing. *Cf. Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 728 (1994) (Kennedy, J., concurring) (noting "the danger of stigma and stirred animosities" that result from the drawing of lines based on race or religion); *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (noting that race-based classifications "threaten to stigmatize persons by reason of their membership in a racial group and to incite racial hostility"). When the United States government singles out its own citizens based on their birth in Puerto Rico as unable to apply for constitutionally protected naturalized citizenship, it sends an unmistakable message that Puerto Rican born United States citizens – defined by place of birth, not individual descent – are a class apart. Puerto Rican born United States citizens are thus marked as undeserving of the protection accorded to other United States citizens who

acquire constitutionally protected citizenship by birth,[2] or to citizens of foreign nations who are eligible to apply for naturalized citizenship.

Neither the injury nor the stigma to petitioner and members of her group is alleviated by the suggestion that persons born in Puerto Rico enjoy "statutory" United States citizenship under 8 U.S.C. § 1402. This Court has held that statutory citizenship is subject to divestment by Congressional imposition of "condition[s] subsequent." *Rogers v. Bellei*, 401 U.S. 815, 834-35 (1971). Even if this Court would not extend its holding in *Rogers v. Bellei* (which involved a repeal of statutory citizenship to foreign-born offspring of United States citizens who did not reside in the United States) to permit Congress to divest the citizenship conferred under 8 U.S.C. § 1402, persons born in Puerto Rico who currently enjoy such "statutory" citizenship are assigned at best to a stigmatizing "limbo" category. They are uncertain of their citizenship rights and are denied the opportunity to achieve assurance, through naturalization, of constitutionally protected citizenship. *See Afroyim v. Rusk, supra*, 387 U.S. at 268 (holding that Congress cannot divest the Fourteenth

---

[2] In *Downes v. Bidwell*, 182 U.S. 244, 251 (1901), a case dealing with the revenue clauses of the Constitution, the Court's plurality opinion stated in dicta that the Fourteenth Amendment's citizenship clause did not apply to Puerto Rico. Two years later, however, the Resident Commissioner of Puerto Rico in Congress argued before this Court as amici that a citizen of Puerto Rico was a constitutional citizen of the United States by virtue of his birth within a United States territory. This Court, while characterizing said argument as "excellent", nonetheless determined that reaching the merits thereof was unnecessary to resolve the controversy before it. *See Gonzales v. Williams*, 192 U.S. 1, 12 (1903).

Amendment citizenship established by birth or naturalization).

Beyond its interest in the welfare of its citizens the Commonwealth of Puerto Rico has an interest in the juridical status of the several million persons born therein, who themselves are United States citizens. Such status is defined under the Constitution and Laws of the United States.

REASONS FOR GRANTING THE PETITION

This case presents an urgent and unique opportunity for this Court to decide what standard of constitutional review applies to a statute that discriminates against United States citizens born in Puerto Rico by denying them an opportunity to acquire constitutional citizenship when that very same opportunity is readily afforded to aliens recently arrived to this Country from virtually every nation. In rejecting the petitioner's constitutional claims the district court cited cases in which this Court has affirmed Congress's broad discretion to grant or withhold naturalization and in which courts have emphasized the "highly deferential" nature of the "rational basis" standard of analysis. This case, however, presents a novel question which should be answered by this Court. Unlike the naturalization cases relied on by the district court, this case does not involve discrimination against or among foreign nationals, but in favor of foreign nationals and against persons born in a Commonwealth of the United States. It is a case of a person with an inferior type of United States citizenship seeking to

fully perfect the same within the meaning of the Fourteenth Amendment.

In cases involving stigmatizing classifications that bear no relationship to individual descent, this Court has occasionally prescribed elevated scrutiny, *see, e.g., Clark v. Jeter*, 486 U.S. 456, 461 (1988) (noting that classifications based on illegitimacy are invalid unless "substantially related to an important governmental objective"), or signaled the appropriateness of a less than wholly deferential form of "rational basis" review, *see, e.g., City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (finding no rational basis for denial of permission to operate a group home for the mentally retarded).[3]

It is an important and undecided question of federal constitutional law whether such an approach is called for in a case involving the stigmatizing discrimination against a group of United States citizens based solely on their birth in Puerto Rico and in favor of citizens of all nations in the world.[4] This Court has described the relationship between the United States and Puerto Rico as having "no parallel in our history." *See Examining Board of Engineers, Architects and Surveyors, supra*, 426 U.S. at 596.

---

[3] *See also Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985) (finding no rational basis for a statute imposing higher taxes on out-of-state than domestic companies); *Zobel v. Williams*, 457 U.S. 55 (1982) (holding that the rational basis test bars a state from affording preferential treatment to older over newer residents).

[4] In this respect, this case is unlike cases in which this Court has held that Congress, pursuant to the rational basis standard, may treat Puerto Rico less favorably than States. *See, e.g., Harris v. Rosario*, 446 U.S. 651 (1980) (per curiam).

In light of this relationship, this Court should grant the instant petition in order to consider whether, under a constitutional test appropriately crafted to reflect Puerto Rico's unique and special status as a Commonwealth of the United States, the United States government can adequately justify stigmatizing United States citizens of Puerto Rican birth by denying them the opportunity of obtaining Fourteenth Amendment citizenship – an opportunity that is available to persons born in the States by birth, and to citizens of other nations by naturalization.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

JOSE A. FUENTES-AGOSTINI
Counsel of Record
Attorney General
Commonwealth of Puerto Rico

GUSTAVO A. GELPI
Solicitor General
Commonwealth of Puerto Rico
Department of Justice
P.O. Box 9020192
San Juan, Puerto Rico 00902-0192
(787) 724-6428, 724-2165